

OFFICIAL PROCEEDINGS OF THE CITY COUNCIL
Rapid City, South Dakota
August 26, 2003

Pursuant to due call and notice thereof, a special meeting of the City Council of the City of Rapid City was held at the City/School Administration Center in Rapid City, South Dakota on Tuesday, August 26, 2003 at 1:15 P.M.

Mayor Jim Shaw, Finance Officer Jim Preston, and the following Alderpersons were present: Jean French, Alan Hanks, Sam Kooiker, Tom Murphy, Bill Waugh, Martha Rodriguez, Ray Hadley, Ron Kroeger, Rick Kriebel and Jeff Partridge; the following arrived during the course of the meeting: None; and the following were absent: None.

The Mayor presented No. 03PL083, a request by Dream Design International, Inc. for a **Preliminary and Final Plat**, located northwest of the intersection of Bendt Drive and Catron Boulevard. The following Resolution was introduced, read and Kroeger moved its adoption:

RESOLUTION APPROVING PLAT

WHEREAS a Plat of Lot 1A and Lot 1B, Block 5 of Stoney Creek Subdivision Phase 1, formerly Lot 1 and Outlot A, Block 5 of Stoney Creek Subdivision Phase 1, located in the SW1/4 NW1/4 and the NW1/4 SW1/4 of Section 22, T1N, R7E, BHM, Rapid City, Pennington County, South Dakota, was filed with the Finance Officer for the purpose of examination and approval by the governing body, and

WHEREAS it appears that the system of streets set forth therein conforms with the system of streets of the existing plats of the City, that all provisions of subdivision regulations have been complied with, that all taxes and special assessments upon the property have been fully paid, and that such plat and the survey thereof have been executed according to law.

NOW, THEREFORE, BE IT RESOLVED that the Plat of Lot 1A and Lot 1B, Block 5 of Stoney Creek Subdivision Phase 1, formerly Lot 1 and Outlot A, Block 5 of Stoney Creek Subdivision Phase 1, located in the SW1/4 NW1/4 and the NW1/4 SW1/4 of Section 22, T1N, R7E, BHM, Rapid City, Pennington County, South Dakota, be, and the same is hereby approved and the Finance Officer of Rapid City is hereby authorized to endorse on such plat a copy of this Resolution and certify to its correctness.

Dated at Rapid City, South Dakota, this 26th day of August, 2003.

ATTEST:
s/ James F. Preston
Finance Officer
(SEAL)

CITY OF RAPID CITY
s/ Jim Shaw, Mayor

The motion for adoption of the foregoing Resolution was seconded by Murphy. Planning Director Elkins noted that surety for this plat was submitted after the 4:00 P.M. deadline last Wednesday. Roll call vote was taken: AYE: Hanks, French, Kooiker, Murphy, Hadley, Kroeger and Kriebel; NO: Rodriguez, Waugh and Partridge. Motion carried, 7-3.

The next item discussed by the Council was No. CC080403-1R, Bid Award for DR01-1125. Motion was made by Kroeger and seconded by Rodriguez to **award the bid** for Arrowhead Basin Detention Pond Element 302, Project DR01-1125 to the low responsible bidder meeting specifications, Lind Exco, Inc., based on their low unit prices bid, for a total contract amount of \$481,413.83. Greg Erlandson, attorney representing Mitch Morris and Black Hills Excavating, went through the qualification of bidders as listed in the bid documents. He

added that Morris Construction is a wholly separate legal entity from Black Hills Excavating. Mitch Morris stated that his intention is to work with the Council and the Engineering Department, not to be in opposition. Based on the proposed actions, Morris stated that he has no choice but to be in opposition to the recommendation from staff. He has received information from his attorney that his company was declared a non-responsible bidder for the Knollwood Project earlier this year. It was his understanding that his bid was not accepted because he did not submit the requested financial information within the allotted time frame. Morris stated that he was never notified that his company was declared a non-responsible bidder. He added that his company has complied with all the elements of the bid for the Arrowhead Basin Detention Pond project and he has seen no substantiated information otherwise. Relative to Morris Construction Company, Morris stated that he is not aware of any project that was done or any notification of work that was performed that was inadequate or substandard, or did not meet specifications, or did not comply with City Engineering's wishes. He added that the Skyview Detention Pond project is still outstanding, but the project was completed to the specifications and standards. There are some closure items that have not been completed, primarily a change order which would increase the contract value and extend the time. That has not been closed out. Morris stated that he does not feel this project is a reason to declare Black Hills Excavating or Morris Construction a non-responsible bidder. Hanks asked what justification needs to come from the City Council in order to declare a company a non-responsible bidder. Asst. City Attorney Jason Green stated that there is no specific criteria set for when someone can be declared non-responsible. The council has broad discretion in determining who is a responsible bidder and when making that determination it is legitimate for the Council to consider past experience with not only the particular entity, such as a corporation, but also with individual members of the legal entities. Kooiker stated that in the future the Engineering Department should have a procedure in place to notify companies within a reasonable time period, when the question of being a non-responsible bidder will be discussed. Upon vote being taken, the original motion to award the bid carried unanimously.

Motion was made by Waugh, seconded by Rodriguez and carried to approve No. SC082603-01 a **House Mover License** for Ron Huntley dba Huntley Construction.

The following Resolution was introduced, read and Rodriguez moved its adoption:

RESOLUTION RELATING TO THE LEASE AND LEASEBACK OF PART OR ALL OF THE MUNICIPAL WASTEWATER SYSTEM; AUTHORIZING THE EXECUTION AND DELIVERY OF VARIOUS AGREEMENTS TO EFFECT SUCH TRANSACTION; FIXING CERTAIN TERMS AND DETAILS THEREOF AND RATIFYING AND AUTHORIZING THE ACTIONS OF CERTAIN OFFICERS OF THE CITY; AUTHORIZING THE REFUNDING OF CERTAIN STATE REVOLVING FUND LOANS AND THE ISSUANCE OF TAXABLE REFUNDING BONDS IN EVIDENCE THEREOF.

WHEREAS, the City is authorized by South Dakota Codified Laws, Chapter 5-28 (the "Act") to enter into lease/leaseback agreements with respect to municipal facilities; and Whereas, the South Dakota Municipal Facilities Authority (the "Municipal Facilities Authority") was specifically created by the Act for the purpose of facilitating such lease/leaseback transactions; and

WHEREAS, the City has been cooperating with Allco Finance Corporation ("Allco") to advise and assist the City in the development of a lease/leaseback program involving part or all of the City's wastewater assets and to determine which assets owned by the City provide the best opportunity to create a net present value ("NPV") benefit to the City; and

WHEREAS, after reviewing the list of the City's wastewater assets which could be utilized in a potential lease/leaseback transaction, Allco concluded that a lease/leaseback transaction

involving the assets described in Exhibit A hereto (the "Assets") represented the best opportunity to create maximum NPV benefit to the City; and

WHEREAS, Allco solicited proposals from financial institutions interested in serving as equity investors for one or more lease/leaseback transactions with respect to the Assets, resulting in proposals being received from interested investors; and

WHEREAS, the proposals from interested investors were reviewed and thereafter clarified, resulting in final proposals being submitted by each institution; and

WHEREAS, the proposals of KBC Bank N.V., Bank of America Leasing, and Fifth Third Bank, N.A. ("Investors") were determined to be most advantageous to the City with respect to the Assets; it is currently contemplated that Fifth Third Bank, N.A., will be the Investor for the City's lease/leaseback transaction; and

WHEREAS, it is proposed that the City enter into lease/leaseback contracts with the Municipal Facilities Authority, the State of South Dakota, one of the Investors (or an affiliate of one of the Investors) and other parties to the transaction; and

WHEREAS, the lease/leaseback contracts would provide for an up-front NPV payment to the City in an amount dependent upon various factors, including but not limited to prevailing interest rates at the time of closing, appraised value of the Assets, final terms of the agreements and expenses incurred in connection therewith; and

WHEREAS, based upon current interest rates, Allco has projected that the NPV benefit to the City with respect to the Assets would be approximately three and sixty-two hundredths percent (3.62%) of the appraised value thereof; and

WHEREAS, it is contemplated that closing on the lease/leaseback for the Assets will occur on or before September 30, 2003; and

WHEREAS, in connection with the contemplated transaction, the City has engaged special counsel and various counsel have been engaged by the Municipal Facilities Authority, Allco and the other parties to the transaction; and

WHEREAS, in connection with the contemplated lease/leaseback transaction, it will be necessary for the City to enter into a set of various agreements relating to such lease/leaseback transaction, including but not limited to the documents listed on Exhibit D hereto, which will be prepared and placed on file with the City Finance Officer (collectively the "Transaction Documents") and to approve various other documents and instruments to be entered into by the other parties to the lease/leaseback transaction, including but not limited to a form of the Trust Agreement and Loan and Security Agreement for the transaction; and

WHEREAS, in connection with the contemplated lease/leaseback transaction, it may be necessary to modify various existing documents (the "Bond Documents") which pertain to the Bonds outstanding with respect to the Wastewater System, as identified in Exhibit B attached hereto.

WHEREAS, in connection with the contemplated lease/leaseback transaction, it is necessary for the City to refund a portion of each of the City's outstanding state revolving fund loans (the "SRF Loans") identified in Exhibit B attached hereto, to amend the loan agreements between the City and the South Dakota Conservancy District relating to the SRF Loans to reflect the partial refunding of the SRF Loans and to issue taxable refunding bonds to the South Dakota Conservancy District.

WHEREAS, the Finance Officer of the City recommends that the City enter into the Transaction Documents with the Municipal Facilities Authority, the State of South Dakota, one of the Investors (or an affiliate of the Investor) and other parties to the transaction, as heretofore recited and as more fully described in the summary heretofore provided.

Now, Therefore, Be It Resolved by the Common Council of the City of Rapid City, South Dakota, as follows:

1. Subject to the provisions of this Resolution and the receipt of any required concurrence of State or federal agencies to the lease/leaseback transaction, the City hereby approves a lease/leaseback contract providing for a head lease for a term not exceeding 99 years and a lease back for a term not exceeding 30 years with the Municipal Facilities Authority and the State of South Dakota, providing for the receipt by the City of NPV payments in such amounts as shall be approved by the Mayor of the City, currently estimated to be approximately \$9,229,102 (exclusive of any fees and expenses to be paid to the Municipal Facilities Authority), and containing such other terms and conditions as are negotiated by City staff in the best interests of the City.
2. It is hereby determined to be reasonably necessary, in order to induce the other participants to enter into the transaction, that the City enter into the Transaction Documents. The Mayor and Finance Officer of the City (the "Designated Officers") are hereby authorized, in consultation with the City Attorney and special counsel to approve, execute and deliver the Transaction Documents and any documents or agreements related thereto, including, but not limited to, an application to the United States Environmental Protection Agency with respect to a disposition agreement pertaining to the Assets and a request from the City to the South Dakota Conservancy District for a consent to the lease/leaseback transaction with respect to outstanding SRF Loans, in such forms as are approved by the City Attorney and containing such terms as shall be approved by the Designated Officers, their execution of the Transaction Documents to be conclusive evidence of such authorization and approval.
3. The Designated Officers are hereby severally authorized to approve, execute and deliver, in consultation with the City Attorney and special counsel, any appropriate agreement, representation letter or modification to the Transaction Documents, in such forms and containing such terms as shall be approved by the Designated Officers, their execution thereof to be conclusive evidence of such authorization and approval.
4. All Transaction Documents and other documents executed and delivered by the City in connection with the transactions contemplated by this Resolution shall be in compliance with the provisions of applicable South Dakota law and the Bond Documents.
5. In connection with the transactions contemplated by this Resolution, the City shall obtain an opinion of bond counsel, in form and substance satisfactory to the Designated Officers, the City Attorney and special counsel to the City, to the effect that the Transaction Documents and the transactions contemplated thereby do not adversely affect the tax-exempt status of the Bonds.
6. Attached hereto as Exhibit C is a form of the notice, which is hereby approved, to be given to all rate payers of the wastewater system of the City indicating how the City intends to spend the NPV payment to the City with respect to the Assets and the impact that the lease/leaseback transaction will have on wastewater rates. The Designated Officers are authorized and directed to cause the notice to be completed, in substantially the form attached hereto, and mailed to all ratepayers of the Wastewater System in the next billing cycle.

7. The City hereby covenants that, to the extent that the amounts payable under the Transaction Documents are not available from other sources, such deficiency will be a general obligation of the City payable from any legally available funds of the City.

8. The execution and delivery of amendments to each of the Loan Agreements between South Dakota Conservancy District (the "District") and the City identified in Exhibit B (the "SRF Loan Agreement Amendments"), the form of which will be prepared and filed with the Finance Officer, and the pledging of the loan payments thereunder for the security of the bonds authorized in paragraph 9 hereof (the "SRF Refunding Bonds") and the interest thereon shall be, and they are, in all respects, hereby authorized, approved and confirmed, and the Designated Officers are hereby authorized and directed to execute and deliver the SRF Loan Agreement Amendments in the form and content submitted to this Council, with such changes that are not substantive as the City Attorney deems appropriate and approves, for and on behalf of the City. The Designated Officers are hereby further authorized and directed to implement and perform the covenants and obligations of the City as set forth in or required by the SRF Loan Agreement Amendments.

9. The issuance of the SRF Refunding Bonds of the City, in the approximate principal amounts (aggregating not more than \$ _____ principal amount), and in the form and content set forth in Appendix A to the SRF Loan Agreement Amendments is hereby authorized, approved and confirmed, and the Mayor, Finance Officer and other appropriate officials of the City shall be authorized to execute and deliver the SRF Refunding Bonds to the District, for and on behalf of the City. The Designated Officers are hereby authorized to approve the final terms of the SRF Refunding Bonds, and their execution and delivery of the SRF Refunding Bonds shall evidence such approval. The terms of the SRF Refunding Bonds, as so executed and delivered, shall be deemed to be incorporated herein by reference. The SRF Refunding Bonds are issued pursuant to South Dakota Codified Laws Chapter 6-8B.

The Common Council does hereby find that all limitations imposed upon the issuance of SRF Refunding Bonds have been met. Each SRF Refunding Bond shall recite that it is issued pursuant to South Dakota Codified Laws Chapter 6-8B and in full compliance with Sections 6-8B-30 through 6-8B-52, inclusive. All refunding bonds issued containing said recital shall be incontestable for any cause whatsoever after their delivery for value.

10. The Designated Officers are hereby authorized, in consultation with the City Attorney and special counsel to approve, execute and deliver such documents and agreements, including but not limited to a tax indemnity agreement, in such forms and containing such terms as shall be determined by the Designated Officers and to effect the transactions contemplated by this Resolution, their execution thereof to be conclusive evidence of such authorization or approval.

11. The Designated Officers are hereby authorized to execute and deliver any and all further documents in forms approved by the City Attorney and to do any and other things as shall be necessary or appropriate, in forms approved by the City Attorney, with the advice of special counsel and bond counsel, in order to effectuate the purposes of this Resolution. If, in the exercise of the authority delegated to the Designated Officers in this Resolution, the Designated Officers determine that it is necessary or appropriate for the Common Council to review any term or provision of any document or any action to be taken in connection with the transactions authorized hereby, the Designated Officers shall bring such matter to the attention of the Common Council for review or approval by the Common Council, as appropriate.

12. As permitted by the Act, the City shall exercise all of the powers conferred upon (a) the South Dakota Building Authority and the Governor pursuant to South Dakota Codified Laws, Sections 5-12-15, 5-12-19, and 5-12-42 through 5-12-45, inclusive, and (b) the Municipal

Facilities Authority or any corporation created by the Municipal Finance Authority under the Act, with respect to the transaction contemplated by this Resolution.

13. The City shall publish this Resolution, except for the Exhibits hereto, after its passage. Exhibits A, B, C and D hereto are on file and available for inspection in the offices of the City Finance Officer.

14. All prior resolutions inconsistent herewith are hereby repealed.

Dated this 26th day of August, 2003.

ATTEST:
s/ James F. Preston
Finance Officer
(SEAL)

CITY OF RAPID CITY
s/ Jim Shaw, Mayor

The motion for adoption of the foregoing Resolution was seconded by Waugh. Finance Officer Preston explained that this Resolution is similar to the document approved for bond refinancing. The Resolution gives the Mayor and Finance Officer authority to conclude the contract if the terms are essentially the same as those presented. The proposal is for a long-term lease of the wastewater treatment facility to an investment trust. The plant would immediately be leased back to the city and would continue to operate in the same manner as it is now. The advantage to the investor is tax depreciation which the city cannot take. The advantage to the city is that approximately 3.6% of the bond proceeds would be available to the city for use as determined by the city council. Preston added that the council must determine how the funds are to be used and do a notice to the ratepayers on this issue. Kriebel urged the Council not to approve the proposed resolution. Asst. City Attorney Jason Green noted that in Paragraph 14, the language "ordinances or" should be deleted. This resolution cannot effect any ordinances which have been approved by the city. Substitute motion was made by Kooiker and seconded by Kriebel to bring the documents back to the City Council for final approval. Scott Schofield of Alco Finance explained that if the resolution is modified so that additional action is needed by the City Council, that will delay the project past the September 30th eadline. He added that the actions of the Council do not take effect until twenty days after they are published in the newspaper. If you wait until the documents are completed and then pass the Resolution, that is when the clock starts. Asst. City Attorney Green concurred noting that until the twenty days after publication runs on this resolution, the authority of the Mayor and Finance Officer technically does not vest. He added that if the documents vary from what is contemplated here today, then the Mayor and Finance Officer do not have legal authority to sign the documents. Murphy requested information on the buy-out for this project when it is available. Hanks stated that in theory he supports the project and feels it would be good for the city. However, without seeing the documents, he is not comfortable approving the motion on the table. French stated that she does not support the item because there is risk involved. Rodriguez asked if the proposed documents could be made available by Tuesday night. Schofield stated that there is a voluminous set of documents that would be prepared pertaining to this transaction. It would be very difficult to get them done by Tuesday night. Mayor Shaw stated that he feels the city should undertake this project because of the financial benefits it will provide. He added that he fully understands the Council's concern about the mechanics of the project and the impact to the city. Partridge spoke in favor of bringing the documents back to the Council for review. Hadley stated that he is uncomfortable approving this project without seeing the supporting documents. Schofield stated that the EPA must be informed on how the city intends to use the revenue generated by this project, however, there are no mandates on how the money must be spent. Hanks stated that his understanding of the motion on the floor is that it will allow the city to move forward with the transaction, with the requirement that the Council ratify the final documentation. Green stated that is his understanding of the amendment. Waugh

called the question and there were no objections. The substitute motion on the floor at this time is to amend the motion to bring the documents back to the Council for final approval. Upon vote being taken, the substitute motion carried unanimously. Substitute motion was made by Waugh, seconded by Rodriguez and carried to amend the resolution, Paragraph 14, by striking the words "ordinances or". Roll call vote was taken on the original motion to approve the Resolution, as amended: AYE: Hanks, Murphy, Rodriguez, Waugh, Kroeger and Partridge; NO: French, Kooiker, Hadley and Kriebel. Motion carried, 6-4.

Motion was made by Rodriguez, seconded by Partridge and carried to go into executive session to discuss contractual matters. Preston noted that no action is anticipated as a result of the executive session.

As there was no further business to come before the Council at this time, the meeting adjourned at 2:25 P.M.

CITY OF RAPID CITY OF RAPID CITY

ATTEST:

Mayor

Finance Officer

(SEAL)